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In the Supreme Court

OF THE

United States.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, and WILLIAM MAYGER,
Appellants,

vs.

MONTANA MINING COMPANY, LIMITED,
Appellee.

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BRIEF OF APPELLANTS.

E. W. TOOLE,
THOS. C. BACH,

Solicitors and of Counsel for Appellants.

In the Supreme Court

OF THE

United States.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, and WILLIAM MAYGER,

Appellants,

VS.

MONTANA MINING COMPANY, LIMITED.

STATEMENT OF FACTS.

This suit was brought by the Montana Mining Company, Limited, against the St. Louis Mining and Milling Company, of Montana, and William Mayger, Mayger being the Superintendent of the St. Louis Mining and Milling Company. The Montana Mining Company, Limited, was, at the time of the commencement of the cause, ever since has been and now is a corporation duly organized and existing under the laws of the Kingdom of Great Britain, and a resident of said Kingdom; the said St. Louis Mining and Milling Company, of Montana was, at said time of the commencement of this cause, ever since has been and now is a corporation organized and existing under the laws of the State of Montana, and the said William Mayger is and was at the time this suit was commenced a citizen and resident of that State. The suit was commenced for an injunction preventing the St. Louis

Mining and Milling Company from driving a tunnel which had its inception in the property belonging to the St. Louis Mining and Milling Company and was driven for the purpose of tapping the vein belonging to the said St. Louis Company on its dip under the surface ground belonging to the Nine Hour lode, a mining property belonging to the said Montana Mining Company, Limited.

A stipulation and agreed Statement of Facts (See Record p. 11) was made between the parties, which said agreed statement of facts the trial court adopted, and based its decree thereon (See Record p. 14.)

Said agreed statement of facts, upon which said decree is based, are as follows:

"STIPULATION AND AGREED STATEMENT OF FACTS.

"It is hereby stipulated between the above-named parties that this case may be submitted to the court for its judgment upon the following agreed statement of facts, which shall be taken and deemed to be the evidence in the case in all respects as if the same were found as the facts by the master in chancery and adopted by the Court:

I.

"The above-named plaintiff is, and was at all the times mentioned in the pleadings herein, the owner of, in possession, and entitled to the possession of that certain mining claim described in its said complaint as the Nine Hour Lode Mining Claim, holding the same under a patent therefor from the United States upon a location made under the United States mining act of 1872 and acts amendatory thereto; that the said

Nine Hour Lode Mining Claim contains valuable deposits of gold, silver and other metals and the said plaintiff has been and is yet engaged in working and mining thereon, and that the value of said mining claim is largely in excess of two thousand dollars.

II.

"That the above-named defendant, the St. Louis Mining and Milling Company of Montana, is, and at all the times mentioned in the pleadings herein was, the owner of the St. Louis Lode Mining Claim, in possession and entitled to the possession thereof, holding the same under a United States patent therefor upon a location made under the United States mining laws of 1872 and acts amendatory thereto. The St. Louis Mining Claim lies west of and adjoining the Nine Hour Claim first herein mentioned, and its value is largely in excess of two thousand dollars.

III.

"That the said defendants at the time of service upon them of the restraining order in the above-entitled action were engaged in running and drifting a cross-cut tunnel, known as the Transcontinental Tunnel, starting within the surface boundaries of the St. Louis Claim, and running thence easterly through the said St. Louis Claim to the westerly boundary line of the said Nine Hour Claim, and thence continuing in a straight line fifteen feet further, and under the surface ground of the said Nine Hour Claim, at a depth of about 260 feet; that the said tunnel was run horizontally through country rock and was so run without the consent of the said plaintiff and against its will and without the said defendants, or either of

them having obtained from the plaintiff, any right of way for said tunnel beyond the easterly boundary line of the St. Louis Claim.

IV.

"That the said St. Louis Mining Claim is a patented mining claim and its location is prior to that of the said Nine Hour Claim. That the discovery vein of the said St. Louis Claim runs parallel with its side lines, and one end thereof passes through its south end line, and the other end thereof passes through the other end line, and said vein dips toward the east.

V.

"That a vein in its full width of gold-bearing quartz, other than said discovery vein, wholly enters the easterly side line of said St. Louis Claim at a point on said line about 480 feet south from the northeast corner of said claim, and thence runs in a southerly direction and with its apex entirely within the surface of said St. Louis Claim until it passes out of the said claim through the said side line and into the Nine Hour Claim at a point about 350 feet northerly from the southeasterly corner of said St. Louis Claim. The dip of this vein is also to the east, the portion thereof the apex of which is within the surface ground of the St. Louis Claim passes on its dip beyond the easterly side line of said claim and under the surface of the said Nine Hour Claim.

"The tunnel above referred to starts at a point on the St. Louis claim westerly of the strike of said last mentioned vein and at a point about midway between the point at which

said vein enters the surface of the St. Louis Claim and the points at which it departs therefrom, and runs toward the said vein, and if extended will intersect said vein at a point thereon which is between perpendicular planes passed through the end lines of the St. Louis Claim (which are parallel) and is also between perpendicular planes parallel to the above-mentioned planes passed through the two points at which said vein intersects the east side of said St. Louis Claim and will not intersect any other vein or lode, before the intersection of the vein above referred to; and that the defendant will not extend said tunnel beyond the point at which it will intersect said vein which apexes within the St. Louis Claim as above mentioned, but proposes and intends to use said cross-cut tunnel in working and mining said vein within the vertical planes last aforesaid on its dip to the full extent of the depth thereof, which constitutes the alleged trespass threatened and intended by said defendants.

VI.

"This stipulation is not intended to, nor shall it in any manner affect the rights of either party, or any of the parties, to any damage or injury they or any of them may sustain or may have sustained on account of any trespass upon said lode claims or any conversion of any quartz rock or ore taken therefrom, and is not intended and shall not limit the rights of either party under the law to any claim for damages, but said stipulation is intended to be, and is limited to the question of the right to an injunction within the planes aforesaid, on account of the extension of said cross-cut tunnel; and this stipulation shall not be considered as evidence of any fact herein stipu-

lated in any other action now pending or which may hereafter be commenced between the parties hereto."

An order was made by the Honorable Hiram Knowles, Judge of the Court, adopting the agreed statement of facts as the findings of fact involved in the cause. (See page 14 of the Record.) And thereafter a final decree perpetually forbidding and restraining the defendant from further prosecuting work on the tunnel mentioned in the complaint, and known as the Transcontinental Tunnel, and from mining and removing any quartz rock or ore belonging to said mining claim by means of said tunnel, or from extending said tunnel further into said claim.

The defendant then appealed to the Circuit Court of Appeals of the Ninth Circuit, which affirmed the decree entered by the District Court. Defendant now appeals to the Supreme Court of the United States.

ASSIGNMENT OF ERRORS.

The Court erred:—

"First—Because it appears from the agreed statement of facts upon which said decree was rendered that the tunnel upon which these defendants are by said decree enjoined from further prosecuting any work was being driven for the purpose of intersecting a portion of a vein of gold-bearing quartz which belongs to the defendant St. Louis Mining and Milling Company of Montana.

"Second—Because it appears from said agreed statement that the said tunnel if extended in the manner intended by these defendants, will intersect the said portion of said vein at

a point therein which belongs to the said St. Louis Mining and Milling Company of Montana.

"Third—Because it appears from said agreed statement that said tunnel, if extended in the manner as intended by said defendants and set forth in said statement, will not intersect any other vein or lode before it intersects that portion of the vein above referred to, and which is the property of the defendant St. Louis Mining and Milling Company of Montana.

"Fourth—Because it appears from said agreed statement of facts that the defendants will not extend said tunnel beyond the point at which it will intersect that portion of the said vein which belongs to the said St. Louis Mining and Milling Company.

"Fifth—Because it appears from said agreed statement of facts that the defendants intend to use said tunnel only in working and mining that portion of the vein mentioned in the pleadings and in said statement, which is the property of the said St. Louis Mining and Milling Company.

"Sixth—Because it appears from the agreed statement of facts herein, and upon which said decree was rendered and entered, that the only trespass which the defendants threaten or intend is the driving of an underground cross-cut tunnel which commenced under the surface of the property belonging to the defendant St. Louis Mining and Milling Company of Montana, and which tunnel defendants intend to continue until it shall intersect a portion of a vein of gold-bearing quartz, which portion of said vein belongs to the St. Louis Mining and Milling Company of Montana, and is underneath the surface ground belonging to the plaintiff, and which said tunnel

said defendants will not extend beyond the point at which it will intersect that portion of the vein referred to, which belongs to the St. Louis Mining and Milling Company of Montana; and which said tunnel so extended will not intersect any other vein than that referred to, and which said tunnel the said defendants intend and propose to use in working that portion of the vein referred to, and which belongs to the said St. Louis Mining and Milling Company of Montana, as appears from the said statement of facts.

"Seventh—Because it appears that said tunnel is being extended and will be extended through what is known as the country rock, not included in plaintiff's grant under its patent, and that said tunnel will in no manner interfere with the surface of any vein, lode or ledge included within said patent, and for that no injury, irreparable or otherwise, will be sustained by the plaintiff.

"Therefore the said defendants and appellants pray that the said decree be reversed, and that this Court be directed to enter a decree dismissing the bill of complaint herein."

ARGUMENT.

We respectfully submit that, for the following reasons, the decree should be reversed:

The facts disclosed by the agreed statement show emphatically that the portion of the vein which the tunnel will intersect has its apex within the boundaries of and runs lengthwise with the side lines of the St. Louis Mining Claim. In fact it will appear that the vein is the same as is found in the case next cited, and the plaintiff in error is the owner thereof

on its dip beyond the side line of the St. Louis claim within the planes referrrd to.

See Montana Mining Company vs. St. Louis M. & M. Co., 102 Fed., 430.

It also appears that the Transcontinental Tunnel is being extended toward this vein, lode or ledge, and is within a few feet of the same, and will penetrate it within the planes described and beneath the surface of the Nine Hour location and patent, and that if permitted to do so appellant company will mine and work the same through said tunnel. It also appears that this vein, lode or ledge will be encountered by the tunnel before any vein, lode or ledge could be reached having its top or apex within the boundaries of the Nine Hour Claim, and the presumption usually indulged that veins, lodes or ledges found beneath the surface of a claim top or apex therein is completely overcome by the facts disclosed in relation to the vein, lode or ledge described in the agreed statement.

There is no allegation in the pleadings that the work done in extending the tunnel through the country rock results in any irreparable injury to the complainant, and there is no allegation that any quartz rock or ore on any vein, lode or ledge apexing in plaintiff's claim has been invaded; on the contrary, it appears from the agreed statement that the tunnel "will not intersect any other vein or lode" before intersecting the vein which has its apex within the surface boundaries of the defendant's mining claim, and that defendant "will not extend said tunnel beyond the point at which it will intersect the vein which apexes within defendant's claim," (p. 13); and

it is not claimed that there will be any interference whatever with the surface of complainant's claim.

The whole scope of the injunction sought to be reversed, therefore, restrains the defendant (plaintiff in error) from continuing the tunnel mentioned and working the lead on its dip to the apex within the surface boundaries of the St. Louis Lode Mining Claim.

The Montana Company, Limited, being the actor and asking the interposition of the equitable jurisdiction of this Court by injunction, we are necessarily led to inquire into the character and extent of the rights acquired by the location and patent of a lode mining claim under the laws of the United States.

We respectfully submit that in so far as the extension of the Transcontinental tunnel is concerned, this injunction should be reversed or so modified as to permit the plaintiff in error to mine and operate through said tunnel all that portion of the vein, lode or ledge apexing inside of the vertical planes referred to in the answer and agreed statement.

We must go to the description of the premises contained in the grant to ascertain what passes by the patent, as this can in no way be enlarged or curtailed by the action of the Land Department in the conveyance of the premises granted. This is especially so in respect to grants by the government, as will be seen by reference to the following authorities:

Slidell vs. Grandjean, 111 U. S., 412, 437.
Heath vs. Wallace, 138 U. S., 548, 585.
Francouer vs. Newhouse, 40 Fed., 618.

The description in the granting clause, Section 2322, Revised Statutes of the United States, is express and unequivocal, and leaves no room for implication, if the doctrine was applicable. The premises GRANTED are "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and all veins, lodes or ledges throughout their entire depth, the top or apex of which lies inside the surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface location."

While the rule is universal that nothing passes under the grant except that which is expressly granted with such incidental rights as are absolutely necessary for its enjoyment, the language of the Statute shuts out all room for implication under the well-established rule of construction. '*Expressio unius est exclusio alterius.*' By expressly declaring that the exclusive right of possession and enjoyment shall be to the surface, and the veins, lodes or ledges having their tops or apexes within the surface boundaries of the claim, it has equally as fully declared that the mass of non-mineral bearing quartz is not included in the grant, except in so far as the same is necessary to the full and complete enjoyment of the surface and veins, lodes or ledges having their tops or apexes inside the boundaries of the claim, according to the calls in the description of the granted premises. Like the high seas upon which the commerce of the world is in a great measure conducted, this barren subterranean region is retained for the COMMON use of the explorer in the more convenient working

of the vein, lode or ledge contained in his grant, and no EXCLUSIVE right of possession and enjoyment thereof is granted to any one. It is reserved to facilitate the practical development and working of the mines of precious metals, and affords to all engaged in such enterprise an easement therein, so that he does not interfere with the granted premises. It creates no underground dividing line between adjoining claimants as to this barren country rock, and establishes no vertical planes except in so far as they are applicable in shutting off the right to the vein in its strike.

Again, the patent cannot include and convey premises not covered by the grant. Congress alone can make primary disposal of the soil, and when the grant is limited to the surface and veins, lodes or ledges having their top or apex inside the surface, the power of the officers of the land department ceases when this is done, and the effect of the patent must be construed accordingly. And so, also, must the provisions of the act be construed *in pari materia*, and if possible made to harmonize. It would be absurd and contradictory to say that the reference to "LAND" in other portions of the act would control the description in the GRANTING clause, which, in express terms limits the word "LANDS" to surface and veins, lodes or ledges having their top or apex within the boundaries of the claim. According to any reasonable rule of interpretation the word "lands" thereafter used means the lands granted, besides it is only the lands granted that can be patented.

If, however, there was any ambiguity as to what was intended to be granted, the eminent propriety of leaving this barren underground region COMMON instead of EXCLUSIVE

property is patent to any one having a fair conception of practical and economical mining.

Indeed, the very purpose of the act was to aid in the development, exploration and sale of the MINERAL LANDS of the government, and the most liberal construction should be given to the law consistent with fundamental rules of interpretation that would best subserve that purpose. Aside from the fact that this mass of non-mineral bearing country rock or material is not included in the grant, it is not only not essential to the enjoyment of the premises granted, but absolutely useless to it except in so far as to afford necessary and proper support, and is usually abandoned after the vein, lode or ledge is worked out and exhausted.

"Besides these unavoidable conclusions reached under the general canon of interpretation of Statutes in such cases, it is manifest that the tunnel of defendant is being constructed for development purposes, and that the right to extend it upon the unappropriated public domain is conceded by section 2323, showing that Congress recognized and appreciated this mode of practically developing and working a quartz mine, and explaining the reason for not including this valueless underground material in the grant, and allowing it to remain public lands for common use instead of private lands for exclusive possession, without any necessity or value for private use or enjoyment except for the purposes mentioned in this section. And so it is Congress never included it in the grant; reserved it as public lands, and has expressly given the right to tunnel through it to one developing a vein or lode, which is exactly the case here. It is true that as to veins discovered

in extending the tunnel the party acquires only such as he would acquire if the discovery was made on the surface, and if the vein, therefore, had its top or apex inside of a legally located or patented claim, the proprietor of the tunnel would acquire no right to it. Yet notwithstanding all this he has the right expressly conferred by the section to "run a tunnel for the development of a vein or lode" in all cases where the government has not parted with the premises involving that right. Indeed the fact that this barren material is not included in the grant, that by the express terms of the act tunnels through it are regarded as expedient and necessary, and provisions allowing them to be made for development purposes, would seem to leave little or no doubt but that Congress had some useful and beneficial object in view in not including it in the grant, and affords a good and sufficient reason why the grant in the patent is confined to the calls in the description of the premises granted. And such was the opinion of the Court in Montana Co. vs. Clark et al., 42 Fed. Rep., 626.

And to the same effect, we claim, is the position of Judge Hallett in the case of the Leadville Mining Co. vs. Fitzgerald, 4 Morrison Mining Report, 380, 384, 385.

In that case the question involved was the right to follow the vein, lode or ledge in its dip into the adjoining claim, the VERY THING GRANTED to the one or the other of the claimants, depending, of course, upon where it had its top or apex. The plaintiff claimed that it originated upon his claim, and there was no question as to the right to tunnel through the non-mineral bearing country rock to develop a vein or lode to which the party projecting the tunnel was entitled, as

is the case here. Yet the guarded language of the learned Judge clearly shows that he had this very distinction in view, and recognized the same throughout the instructions given in the case. This will be observed from the fact that whenever he speaks of the premises granted, he refers to the surface and vein, lode or ledge having its top or apex within the boundaries of the claim. If he was pursuing a vein, lode or ledge under the adjoining claim, his right depended upon where its top or apex existed. This no one doubts. But what does this argue as to a portion of the body of the earth not lying upon the surface or included in any vein, lode or ledge essential to its enjoyment? Here the plaintiff below is the actor, and unless it can show that it has the exclusive right of possession and enjoyment to this portion of the earth not being surface or vein, lode or ledge topping or apexing in its claim or material for the support of either, it is immaterial as to it what others do in tunneling through it to develop a vein, lode or ledge to which the projector of the tunnel is entitled.

The learned Judge, in the case last cited, whenever he has occasion to refer to the exclusive rights of an adjacent owner, limits it to all veins, lodes or ledges that may be found inside his claim, unless it can be shown to top or apex in the claim of another, thereby making the fact that it is found in a claim *prima facie* evidence that it TOPPED or APEXED therein, and adds:

"There is a presumptive ownership of every locator of the territory covered by his location," not as against one running a tunnel through the non-mineral bearing portion thereof, but in so far as relates to the veins, lodes or ledges therein.

The language must be construed with reference to the matter in hand, which involved a presumption for the purposes of preserving a vein, lode or ledge which may or may not have passed under the grant. How different, however, if the projector of the tunnel was constructing it through barren material, unaffecting the surface or any vein, lode or ledge topping or apexing in his ground, but to develop a vein, lode or ledge topping or apexing in the claim of such projector.

It would cease to be a mere matter of presumption as a matter of convenience in determining upon whom devolved the burden of proof, and become one of actual right, and if the party seeking to enforce the extension of the tunnel failed to show HIS EXCLUSIVE RIGHT, he must fail.

So in Iron Silver Mining Company vs. Elgin Mining and Smelting Company, 118 U. S., 196, Sup. C. Rep., 1177, the vein, lode or ledge in question was so located as to confer no extra lateral rights, and the question involved the right to the vein, lode or ledge and mineral therein contained within the surface boundaries of adjacent claims, and in no way involved or elicited an opinion as to the mass of country material beneath the surface, and not contained in any vein, lode or ledge of valuable mineral. Of course, when the grant simply conveys public land within certain prescribed boundaries, as in pre-emption, homestead and placer claims, there could be no question but that what is usually known as a common law right to the granted premises obtains.

If the government has the right to segregate the surface and veins, lodes or ledges from the balance of a claim with defined boundaries, and pass the same by grant, it has cer-

tainly in plain terms done so by Sections 2322 and 2323 *supra.*

Indeed, it may well be said that under the language used in the grant, if between INDIVIDUALS, there is no such ambiguity as would render parol evidence admissible to show that anything else was intended to pass except the surface and veins, lodes or ledges topping or apexing therein, aside from what was necessary for their support and enjoyment. So it is as to the government. It will be conclusively presumed to have granted just what it has in express and unequivocal terms granted, and nothing else. The grant comprises land, and when referred to as land in other parts of the act, it means, and is limited, to the land granted, otherwise we have the tail wagging the dog. This is as true as that an express grant excludes the idea of an implied grant, or that an express warranty excludes an implied warranty, and limits the warranty to that expressly granted. If A should convey to B a piece of land, reserving the exclusive right of possession and enjoyment of the surface and all veins, lodes or ledges having their outcrop or apex therein, and the *tenendum* clause in the deed referred to said lands, could it with propriety be claimed that the grant was thereby enlarged so as to include the reserved premises. It is difficult to understand upon the same process of reasoning why, if A should convey to B the surface and all veins, lodes or ledges having their top or apex therein, how a reference to the LAND conveyed thereafter in the deed could enlarge the grant so as to include something not contained in or necessary to the enjoyment of that which is expressly granted. The principle of construction is equally applicable to the statute, as the statute constitutes what we

may say the grant, and the patent is but evidence of it. If this would be the result as to individuals, it would seem that no good reason could be urged why it should not apply to grants from the government when the property of the public is thereby conveyed. The STATUS of a piece of land with respect to surface and the mines that may exist therein is nothing new to the bench and bar. As a part of our country's history, it is generally known that Montana was a portion of the territory ceded by Spain to France, and embraced in the purchase by the United States from the latter nation. And it has been held by the Supreme Court of the United States in New Orleans vs. United States, 10 Peters, 662, 724, that the laws of Spain were in force. After the acquisition of California, gold was discovered in its boundaries on the 3rd of December, 1849, and the attention of Congress was at once called to the fact by the then Secretary of State, Hon. Thomas Ewing. In his communication he announced that the right to the mines of precious metals, which by the laws of Spain remained in the Crown, was retained by Mexico while she was sovereign of the territory, and had passed by her transfer to the United States; that in the purchase and sale of the soil it was a right which vested in the sovereign, and that it remained with Congress to say whether this right should be retained or passed with the grant of the soil, and it would require an express law to effect the passage of a mining right with such a grant. For a full statement upon this subject we refer to the Public Domain, page 309. In the laws of the Partidas Spain declared that it required an express grant in order to confer the right to hold and use mines, and that such grant from the King ceased at his death. In United States

vs. Castilero, 2 Black, 17, the Supreme Court asserts the doctrine that the right to mines is distinct from the right to land for agricultural or other ordinary purposes existing in the parent country before the independence of Mexico, and that these distinct rights might be vested in the SAME or DIFFERENT persons. And this is the rule of the common law since the time of William the Conqueror, and is imported into and becomes a part of the jurisprudence of this country, as will be seen by reference to First Blackstone Commentaries, 295, and First Greenlief's Cruise, 38. At the time, then, of the exercise by Congress of its constitutional powers in disposing of the public domain by the enactment of the mineral land law of 1866, and its amendments of 1872, a MINING and other right to a piece of public domain might exist as a separate and distinct estate in the same or a different individual. The legislation of Congress upon the subject has certainly not abrogated this doctrine, but on the contrary has given it express recognition by granting to the locator these separate and distinct estates in the same premises. By Section 2322, Revised Statutes of the United States, a grant is made to a locator of the exclusive right of possession and enjoyment of all the surface of the land within the lines of his location, and all veins, lodes or ledges the tops or apexes of which are inside of such surface location, and confers upon him the right to follow such veins or lodes in their course downward laterally inside of the end lines of the location, even though they may so far depart from a perpendicular as to enter beneath the surface location of another. There is, then, the grant of a surface right and mining right in one and the same person

to the same piece of public domain. He is at liberty to sell, or may otherwise lose or dispose of either in any of the modes provided by law. The issuance of the patent to defendant mining company in this case (plaintiff herein), is conclusive evidence of the grant contained in the section of the statute referred to, and is conclusive evidence that the patentee or his grantors had in all respects complied with the law in making the location and securing the EXCLUSIVE RIGHT to the POSSESSION and enjoyment of the surface and VEINS, lodes or ledges included within the lines of its location. This patent is but a confirmation of the grant secured by Section 2322, and cannot be enlarged or curtailed by the ministerial officers of the Land Department in the issuance of a patent for granted premises. These particular estates in a piece of land may be segregated by the owner of the premises, and it would seem unreasonable to suppose that Congress, charged under the Constitution with the power and duty of disposing of the public domain, could not likewise segregate them, in the manner it has done, under the section to which we have referred.

The history of our mining law brings the force of its irresistible testimony to the inevitable conclusion that Congress conveyed, and expressed in the grant, precisely what it intended to convey and express. It is a well-known fact that it was compiled from the customs, rules and regulations of the miners and decisions of the courts which recognized the vein, lode or ledge as the principal thing, and the surface as an appurtenance to it, if land could at all be regarded as appurtenant to land. The vein, lode or ledge with so much surface ground as was necessary and convenient for working

the same, was all that was taken into account. The only distinction now to be made is the grant of the exclusive possession and enjoyment of these, to the locator by the government, thereby conferring a right which he theretofore enjoyed only by sufferance and custom.

Nor is it claimed or pretended that the projection of the tunnel has, or will, interfere with the surface or injure any vein, lode or ledge having its top or apex in complainants' claim. Nor is it claimed or pretended that the construction of the tunnel through this barren rock is doing any irreparable injury, or any injury at all. Hence the only question of any importance is the alleged threat to work quartz rock or ore belonging to complainant, which may in the future be encountered in prosecuting the work upon the tunnel, and that it is agreed the defendants below will not do.

The only rights of the complainant that could be injured would be by reason of the invasion of some lead, lode or ledge having its top or apex inside the boundary lines of its claim, and the extraction and conversion of its quartz rock or ore therein contained, and this, it is agreed in the Statement of Facts, the defendants below will not do.

And such veins in connection with the surface being what is EXPRESSLY granted, and nothing passing under such EXPRESS grant by implication as against the government or individual except that which is necessary to its enjoyment, the mass of the country rock not enumerated or mentioned not passing under the grant, it is reserved to the government, and the government having conceded the right to run tunnels through the same to develop a vein, lode or ledge, and defend-

ants projecting the tunnel for that purpose, have a right to project the same, and a bare threat to trespass upon the property of another cannot work a forfeiture of such right. The law does not visit such results upon the possessor of such a right, and the court will go no further than protect the threatened property—which could easily be done before or after the vein is reached. Hence an injunction prohibiting defendant from working through its tunnel any quartz or ore included in the vein, mentioned in the agreed statement, whether reached or thereafter to be reached by the tunnel, is not warranted by the law applicable to the case at bar.

It MAY BE that should the respondents in projecting their tunnel strike a vein, lode or ledge beneath the surface of the Nine Hour Lode, the presumptions would be that such vein, lode or ledge had its top, or apex, inside the Nine Hour claim. It will be noted, however, that this presumption is entirely overcome by the agreed statement showing that the vein apexes inside the boundaries of the St. Louis Claim, and that lines drawn parallel with the end line at the point of intersection of the apex with the side line will leave the portion of the vein tapped by the tunnel entirely south of where the apex of the vein passes out of the side line of the St. Louis Claim, on the northerly end, and north of the point at which the vein passes out at the southerly end; that is to say, the portion of the vein which will be worked by the tunnel has its apex entirely within the St. Louis Claim, and belongs to said claim, as decided in the case of Montana Mining Co. vs. St. Louis M. & M. Co., 102 Fed., 430.

Recurring again to the provisions of sections 2322 and

2323, in addition to what has been said, why is it that Congress intended to convey by the grant a common law title to a piece of land that it did not simply, as in other cases, describe it by boundaries and leave the matter there? Why did it refer especially in the grant to the surface? Why did it refer particularly to veins, lodes or ledges having their top, or apex, within the lines of the SURFACE location? Why did it not say all veins, lodes or ledges apexing within the CLAIM if the mass of country material, aside from such veins, lodes or ledges passed by this grant? Why does it use the words 'vertical planes,' and then limit it to the vein, lode or ledge in its strike? It is manifest that the only vertical planes applicable to the premises granted is confined to the vein, lode or ledge on its strike, or dip, and that these are to be projected whenever they depart from the surface boundaries on their strike, and that, too, regardless of where they pass out of the side lines of the claim. If Congress had intended to have conveyed what is claimed in Doe vs. Waterloo, it would have contented itself by describing a certain piece of LAND, reserving an easement right to follow the veins, lodes or ledges having their tops or apexes therein, in their downward course into the CLAIM OR LANDS of another. But we find this is not the case; that the grant is limited to certain defined portions of the land in its common law sense, and that vertical planes are of no consequence, except for the purpose of cutting off the vein, lode or ledge on their strike.

If A should enter into an agreement with B by which he would sell to him the SURFACE and certain VEINS, LODES OR LEDGES topping or apexing within such

SURFACE boundaries, and provide that upon the payment to him the sum of five dollars per acre, he would make B a deed for said LANDS, would not the term "land" be limited to the SURFACE and the VEINS, LODES OR LEDGES he had agreed to sell?

Applying these principles to the mining law, which is a conditional grant as well as a law, the term lands would be limited to the surface and veins, lodes and ledges upon said lands, and the veins, lodes or ledges are "the lands" referred to in which mineral deposits are found, and the SURFACE is the LAND for which five dollars per acre is to be paid. And this likewise defines and limits a mining CLAIM OR LOCATION. The rights about which we are speaking are not reserved rights. The question simply is, what rights are conveyed by the grant, and the grantee is not in a situation under such grant to say "hands off" of anything except the granted premises and whatever is indispensable for its enjoyment. This is in accord with the doctrine announced in Freeman, Cotenancy and Partition, Section 435, wherein it is said "that although there cannot be two FEE SIMPLES ABSOLUTE in one and the same land, yet that the mines, ores and minerals BEING LAND, a man may have a fee simple in them as well as he who holds the soil that REMAINS UNCONVEYED may have a fee simple, for they are not the self same lands." We conclude that the mass of country rock and material not described in the grant WAS NOT CONVEYED, and that the United States has conceded the right to tunnel therein for "the purpose of developing a vein or lode," and that defendants when enjoined were exercising that right. The law or grant has only

created a superior right in that which was theretofore held by license under the rules, regulations and customs of miners.

The grant is of the vein, lode or ledge with the surface to enable the convenient working of the minerals contained in them, under the doctrine announced in Canfield vs. Ford, 28 Barbour, 339, and same vs. same, 16 Howard's Practice Report, 483, and the express language of the grant itself. We claim that the doctrine here announced has been established by a recent decision of the Supreme Court of the United States in The Del Monte vs. The Last Chance, 171 U. S., 57. In the Del Monte case the Court reviews the history of the mining laws; and the learned Justice writing the opinion shows clearly that the deed conveys nothing but veins and surface—shows clearly of how great importance is the vein, and also that the only importance of surface is the fact that it is the surface that limits the extent of the vein to which the claimant is entitled.

Speaking of the law of 1866, Justice Brewer, in the opinion referred to, says: "Obviously the statute contemplated the patenting of a certain number of feet of the particular vein claimed by the locator, no matter how irregular its course, made no provision as to the surface area," etc. Again speaking of the same law, and of the patents issued thereunder, he says: "Often they (the patents) were like a broom, there being around the discovery shaft an amount of ground deemed large enough for the convenient working of the mine, and a narrow strip extending therefrom as the handle of the broom."

And the Court further says: "Again, the location upon surface is not made with the view of getting benefit from the

use of that surface. The purpose is to reach the vein which is hidden in the depths of the earth."

In the above argument we have several times stated that it is conceded by the agreed statement of facts that the plaintiffs in error will not use the tunnel referred to for the purpose of extracting any ore belonging to the defendant in error (plaintiff below), which will appear from the agreed statement on Record p. 13, where it is agreed as a matter of fact that the tunnel will not intersect any other vein or lode before the intersection of the vein mentioned in the complaint and the agreed statement of facts (and which belong to the appellants); and that the appellants will not extend the tunnel beyond the point of intersection with the said vein. Inasmuch, then, as our tunnel, which we propose to drive, and which we are enjoined from driving, will not intersect any vein except that which does belong to us, it is quite apparent that there is no endeavor and no thought upon the part of the plaintiffs in error to reach any ore body belonging to the defendant in error. In order to reach any vein belonging to the defendant in error, the appellants would have to drive the tunnel through and beyond the vein, (which it has been decided belongs to us), and the agreed statements of facts shows expressly that the tunnel will not be driven beyond the point which intersects said vein.

For the reasons above stated, we respectfully submit that the decree should be reversed.

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